

Hasbala Mohd Sarong v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO
05–87–05 OF 2012(B)

RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF,
ABDULL HAMID EMBONG AND JEFFREY TAN FCJJ

26 JUNE 2013

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Criminal Law — Dangerous drugs — Trafficking — Whether unexplained difference in weight of drugs between that taken by police and later by chemist entitled accused to acquittal — Whether difference immaterial — Whether judicial notice could be taken that drugs could have dried and lost weight in storage before chemist tested same — Whether chain of movement of drug exhibits from time of seizure until production during trial proven to be unbroken — Whether identity of drug exhibits never challenged by accused either at trial or before Court of Appeal

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The appellant was convicted and sentenced to death by the High Court under the Dangerous Drugs Act 1952 for trafficking in 4,607g cannabis which was found in a bag he was carrying when he was arrested by police at a bus station. Following the dismissal of his appeal to the Court of Appeal against conviction and sentence, the appellant filed the instant appeal in which he contended that there were two material discrepancies in the trial of his case which entitled him to be acquitted and discharged. One discrepancy was that the report of the chemist ('PW3') originally stated that the drug exhibits she received from the police for analysis were wrapped in aluminium foil reinforced by adhesive tape. This contradicted with the testimony of the arresting officer ('PW4') and the investigating officer ('PW6') who both said the exhibits were wrapped in transparent plastic. The other discrepancy was that whilst PW3 found the gross weight of the drugs to be 4,688.55g, PW6 had recorded its weight as 4,860g — a difference of 171.45g. On the authority of the Federal Court's decision in *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348, the appellant submitted that the prosecution's failure to explain the said discrepancies created a reasonable doubt as to the identity of the drug exhibits entitling him to an acquittal.

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Held, dismissing the appeal and affirming the conviction and sentence:

- (1) On the facts and circumstances of the present case, the unexplained difference in weight of the drug exhibits itself as found by PW6 and PW3 was not sufficient to create a reasonable doubt on the prosecution's case. An explanation from the prosecution would have been desirable but there was no doubt the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits the appellant was charged with (see paras 21 & 25).

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- A (2) There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses in particular PW4, PW6 and PW3. The identity of those exhibits was also never an issue either before the High Court or before the Court of Appeal. The difference in the gross weight of the drugs could have been due to the fact they were weighed by PW3 nearly three months after they were weighed by PW6. The court took judicial notice that climate conditions and humidity could cause a difference in weight. Given the interval of three months before the exhibits were sent to PW3, the cannabis could have dried up causing the lesser weight. In any event, the weighing process used by the police was not the determining factor, but rather that done by the chemist which determined the actual weight of the drugs and which formed the basis of the charge (see paras 21 & 25).
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- D (3) The weighing done by the police after the seizure of the drugs was only for classification purposes in determining the charge that would most likely be preferred against the arrested person. More often than not, the disparity in the weight of the drugs recorded was inevitable due to the different weighing methods and different weighing apparatus used by the police and by the chemist department (see para 21).
- E (4) Although the chemist's report originally stated that the drug exhibits received by PW3 from SP6 were wrapped in aluminium foil reinforced by adhesive tape, PW3 corrected that statement in the report when she was testifying and she applied to the court to have the report amended to state the exhibits were in fact wrapped with transparent plastic. The amendment was allowed without objection from the defence (see para 17).
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- G (5) The facts and circumstances in *Zaifull bin Muhammad* were distinguishable from the instant case in that, there, the discrepancies unexplained by the prosecution concerned not only the gross weight of the drug exhibits but also the number of slabs of the drugs. It was under those circumstances that the court held the unexplained discrepancies created a reasonable doubt as to the identity of the exhibits and that, accordingly, the defence should not have been called (see paras 16–17).

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[Bahasa Malaysia summary]

Perayu telah disabit dan dijatuhkan hukuman mati oleh Mahkamah Tinggi di bawah Akta Dadah Berbahaya 1952 kerana mengedar 4,607g kanabis yang dijumpai dalam beg yang dibawanya apabila dia ditangkap oleh polis di stesen bas. Berikutan penolakan rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman, perayu memfailkan rayuan ini yang mana dia berhujah bahawa terdapat dua percanggahan yang penting dalam perbicaraan kesnya yang melayakkannya dibebas dan dilepaskan. Salah satu daripada percanggahan itu adalah bahawa laporan ahli kimia ('PW3') yang pada asalnya menyatakan

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bahawa ekshibit-ekshibit tersebut dibalut dalam kerajang aluminium yang diikat dengan pita pelekat. Ini bercanggah dengan testimoni pegawai tangkapan ('PW4') dan pegawai siasatan ('PW6') yang kedua-duanya menyatakan ekshibit-ekshibit tersebut dibalut dengan plastik lutsinar. Percanggahan lain adalah di mana PW3 mendapati berat kasar dadah adalah 4,688.55g, PW6 telah merekodkan beratnya sebagai 4,860g — perbezaan 171.45g. Berdasarkan autoriti keputusan Mahkamah Persekutuan dalam kes *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348, perayu berhujah bahawa kegagalan pendakwaan untuk menjelaskan percanggahan tersebut mewujudkan keraguan munasabah berhubung identiti ekshibit-eksbihit dadah yang melayakkannya pelepasan.

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Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

- (1) Berdasarkan fakta dan keadaan kes ini, perbezaan yang tidak dijelaskan tentang berat ekshibit-ekshibit dadah tersebut dengan sendirinya seperti didapati oleh PW6 dan PW3 adalah tidak mencukupi untuk membentuk keraguan munasabah ke atas kes pendakwaan. Penjelasan daripada pendakwaan adalah wajar tetapi tidak diragui ekshibit-ekshibit dadah tersebut telah dirampas daripada perayu dan sebagaimana diperiksa oleh ahli kimia adalah ekshibit-ekshibit dadah yang sama seperti yang didakwa ke atas perayu (lihat perenggan 21 & 25).
- (2) Rantainya keterangan tidak terputus dan ekshibit-ekshibit dadah tersebut secara positif telah dikenal pasti oleh saksi-saksi pendakwaan khususnya PW4, PW6 dan PW3. Identiti ekshibit-ekshibit tersebut juga tidak pernah menjadi isu sama ada di hadapan Mahkamah Tinggi atau di hadapan Mahkamah Rayuan. Perbezaan dalam berat kasar dadah tersebut mungkin disebabkan ia ditimbang oleh PW3 lebih kurang tiga bulan selepas ia ditimbang oleh PW6. Mahkamah mengambil notis kehakiman bahawa keadaan cuaca dan kelembapan boleh menyebabkan perbezaan berat. Berdasarkan tempoh tiga bulan sebelum ekshibit-ekshibit itu dihantar kepada PW3, kanabis tersebut mungkin telah kering sehingga menyebabkan berat berkurangan. Dalam apa keadaan, proses penimbangan yang digunakan oleh polis bukan faktor yang menentukan, malah sebaliknya yang dilakukan oleh ahli kimia yang telah menentukan berat sebenar dadah tersebut dan yang membentuk asas pertuduhan tersebut (lihat perenggan 21 & 25).
- (3) Penimbangan yang dibuat oleh pihak polis selepas rampasan dadah tersebut hanya untuk tujuan pengklasifikasian bagi menentukan pertuduhan yang mungkin boleh dibuat terhadap orang yang ditangkap. Selalunya, perbezaan dalam berat dadah yang dicatatkan adalah tidak dapat dielakkan kerana kaedah timbang yang berbeza dan alat timbang yang berbeza yang digunakan oleh polis dan jabatan ahli kimia (lihat perenggan 21).

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- A (4) Walaupun laporan ahli kimia pada asalnya menyatakan bahawa ekshibit-ekshibit dadah yang diterima oleh PW3 daripada SP6 telah dibalut dalam kerajang aluminium dan diikat dengan pita pelekat, PW3 membetulkan kenyataan dalam laporan itu apabila dia memberi keterangan dan dia memohon mahkamah agar laporan itu dipinda untuk
- B menyatakan ekshibit-ekshibit tersebut pada hakikatnya telah dibalut dengan plastik lutsinar. Pindaan tersebut dibenarkan tanpa bantahan daripada pihak pembelaan (lihat perenggan 17).
- C (5) Fakta dan keadaan dalam kes *Zaifull bin Muhammad* boleh dibezakan dengan kes ini yang mana terdapat percanggahan-percanggahan yang tidak dijelaskan oleh pendakwaan berkaitan bukan sahaja berat kasar ekshibit-ekshibit dadah tersebut tetapi juga bilangan ketulan mampat dadah. Adalah berdasarkan keadaan berikut bahawa mahkamah memutuskan percanggahan yang tidak dijelaskan mewujudkan keraguan munasabah berhubung identiti ekshibit-ekshibit itu dan bahawa,
- D sewajarnya, pembelaan tidak patut dipanggil (lihat perenggan 16–17).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2013 reissue) paras 205–300.

Cases referred to

Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)

Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)

- F *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ Rep 372, SC (refd)

Zaifull bin Muhammad v Public Prosecutor and another appeal [2013] 2 MLJ 348; [2013] 2 MLRA 546, FC (distd)

Legislation referred to

- G Dangerous Drugs Act 1952 ss 2, 37(da)(vi), 39B(1)(a), (2)

Appeal from: Criminal Appeal No B–05–235 of 2010 (Court of Appeal, Putrajaya)

Gooi Soon Seng (Gooi & Azura) for the appellant.

- H *Nurulhuda Nur'aini Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Raus Sharif PCA (delivering judgment of the court):**I****INTRODUCTION**

[1] The appellant was charged in the High Court for an offence of trafficking

in dangerous drugs, to wit 4,607g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act ('the DDA').

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[2] On 31 May 2010, the High Court found the appellant guilty and sentenced him to death. On 8 May 2012, the Court of Appeal unanimously affirmed the conviction and sentence.

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[3] We heard the appeal on 25 March 2013. After hearing the parties, we dismissed the appeal. We now give our reasons.

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THE FACTS

[4] The facts relevant to the issues raised in this appeal are these. The appellant was arrested on 27 February 2004 at about 10pm at the bus station in front of the Proton Car manufacturing company at Seksyen 26, in Petaling District of Selangor. At the time of his arrest, he was carrying a green DIADORA canvass bag (P10). Inside P10, Inspector Musafar bin Mahmud ('PW4') found five slabs of cannabis wrapped in transparent plastic (exhs P12, P14, P16, P18 and P20). A search list (P22) was prepared and issued by PW4.

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[5] PW4 marked the bag P10 with 'A' and affixed a date '27/2/2004' on it. The five slabs of drug exhibits were each marked as 'A1 to A5' respectively. PW4 also placed his signature and affixed the date '27/2/2004' on each of the five slabs of drug exhibits.

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[6] On 28 February 2004, at about 1am PW4 handed the exhibits to the investigating officer of this case, Chief Inspector Idris bin Seth ('PW6'). The handing over was documented in P23. PW6 then placed his own markings similar to PW4 on all the exhibits with a date '28/2/2004'. He also placed his signature on all the exhibits. PW6 then weighed the five slabs of the drugs exhibits. The weight recorded was 4,860g. He then kept the exhibits in a locked cabinet to which he held the key.

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[7] On the next day, PW6 instructed the police photographer Atan ak Desa ('PW1') to take photographs of the exhibits. After the photographs were taken, the exhibits were sent to Inspector Faizal of the Forensic Unit. The exhibits sent were documented in P24. The same exhibits were received by PW6 from Inspector Rahayu Ghani at 9.17am on 8 June 2004. The handing over was documented in P25. After the receipt of the exhibits, they were kept by PW6 in a locked cabinet to which she kept the key.

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[8] On 9 June 2004, PW6 sent the bag P10 and drug exhibits to the chemist

A ('SP3'). Before dispatch, the exhibits were packed and sealed in a box marked 'A'. On the box, PW6 placed the police report No Batu 3 Report No 3038/04 as well as his name.

B [9] PW3 confirmed receiving the sealed box (exh P9) marked as 'A' from PW6 on 9 June 2004 at 10.07am. PW3 issued a receipt (P7) bearing *Makmal* (PJ) FOR 5021/04-0 and a sticker with the same lab number placed on the box marked 'A'. PW3 inspected the box and found it to contain a DIADORA canvass bag marked 'A' with five slabs of dried leaves which were marked as A1–A5 respectively. In her chemist report (P8) she stated that the five slabs of
C drug exhibits that were received from SP6 was wrapped in aluminum foil reinforced by adhesive tape. But while giving evidence in court, she corrected it by stating that the five drug exhibits were wrapped with transparent plastic. She then applied to the court to have the chemist report P8 amended by substituting the word aluminum foil with transparent plastic.

D [10] PW3 weighed the five slabs of the drug exhibits separately. The total gross weight recorded was 4,688.55g. Upon analysis of the exhibits, PW3 found that the drug exhibits were cannabis as defined under s 2 of the DDA. The net weight was 4,607g. After PW3 had completed her analysis, the loose
E plant materials were placed in five separate plastic packets. These five packets together with the original wrappers and the bag were placed into the original box marked 'A' and sealed with the department's seal. On 9 September 2004 at about 9am, PW3 handed to PW6 the box marked 'A' containing the exhibits together with the chemist report (P8).

F [11] PW6 thereafter had the exhibits registered and kept safe at the store exhibit at the Narcotics Department at the Selangor Police Headquarters. The exhibits were kept there until they were produced for trial in the High Court.

G ISSUES AND FINDINGS

H [12] Before us, learned counsel for the appellant submitted that there were material discrepancies on the condition of the drug exhibits, in particular with regard to the manner in which the drugs exhibits were wrapped and the gross weight of the drugs exhibits as found by the chemist ('PW3') and that of the investigating officer ('PW6').

I [13] According to learned counsel, PW4 and PW6 testified that the five slabs of the drug exhibits were wrapped in transparent plastic. However, PW3 in her chemist report stated that the five slabs of the drug exhibits she received from PW6 were wrapped in aluminum foil reinforced by adhesive tape. With regard to the gross weight of the drugs, learned counsel pointed out that PW6 testified that the gross weight of the drug exhibits was 4,860g but PW3 in her evidence

stated that the gross weight of the drug exhibits was 4,688.55g. There was a difference of 171.45g between the gross weight of the drug exhibits as found by PW3 and PW6.

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[14] It was submitted by learned counsel that discrepancies as illustrated above were not satisfactorily explained by the prosecution and this had created a reasonable doubt as to the identity of the drug exhibits. On this ground alone, learned counsel urged this court to acquit and discharge the appellant. In support, learned counsel relied heavily on the recent decision of this court in *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 MLRA 546, where it was held:

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... it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibits. In the circumstances, the defence should not have been called at the close of the prosecution's case.

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[15] In *Zaifull bin Muhammad*, there were two material discrepancies, one as to the number of 'ketulan' and the other as to the gross weight of the cannabis. In the original charge, it was stated the appellant was in custody of and control of six 'ketulan' of cannabis, and gross weight was 880g. But the evidence led by the prosecution was in relation to two 'ketulan'. The police witnesses PW4 and PW8 consistently spoke of only two 'ketulan' of cannabis and no one ever mentioned six 'ketulan' as stated in the original charge. The chemist, who received the drug exhibits from PW8 also spoke of two 'ketulan' as opposed to six 'ketulan'. He found the gross weight of the two 'ketulan' of cannabis to be 829.49g.

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[16] Thus, in *Zaifull bin Muhammad* the discrepancies were not only on the gross weight of the drugs exhibits but also on the number of slabs. The discrepancies were never explained by the prosecution. And it was under those circumstances that this court held that the unexplained discrepancies had created a reasonable doubt as to the identity of the drug exhibits and the defence should have not been called at the close of the prosecution's case.

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[17] The facts and circumstances in the present case is distinguishable from *Zaifull bin Muhammad*. In the present case, while it is true that the chemist had in the chemist report stated that the five slabs of drug exhibits that she received from SP6 were wrapped in aluminum foil reinforced by adhesive tape but she corrected it while giving evidence in court by stating that the five slabs of drug exhibits were wrapped with transparent plastic. She also applied to the court to have the chemist report P8 amended by substituting the word aluminum foil with transparent plastic. The amendment was allowed with no objection by the defence counsel. In this regard it is pertinent to note that the identity of the

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- A drug exhibits was never an issue before the High Court as well as the Court of Appeal. There was no challenge as to the identity of the drug exhibits by the defence.
- B [18] We are of the view that, with the amendment as well as the correction made by SP3; and, in the absence of any challenge by way of cross-examination on the identity of the drug exhibits, the issue of discrepancies on the manner in which the five slabs of drug exhibits were wrapped is devoid of any merit.
- C [19] Thus, the only issue left is whether the unexplained difference between the gross weight of the drug exhibits as found by PW6 and that of PW3 is sufficient to create a reasonable doubt to the prosecution's case. On the facts and circumstances of this case, we answer the issue raised in the negative. In this case PW4, and PW6 had clearly identified the drug exhibits that were produced before the High Court. Both PW4 as well as PW6 had identified the markings that they had made on the exhibits including the date and the signatures they placed on the five slabs of the drug exhibits. PW3 too had identified the markings as found on the exhibits when she received it from PW6.
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- E [20] Having regard to the evidence of PW4, PW6 and PW3, learned counsel's contention that the drug exhibits produced before the High Court might not be the same as the one seized by PW4 from the appellant is, in our view, misconceived. On the evidence adduced, we are not in doubt that the drug exhibits seized and handed to PW6 and examined by PW3 were the same drug exhibits that were produced before the High Court upon which the appellant was charged. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drug exhibits.
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- G [21] It is not in dispute in this case that PW 6 found the gross weight of the drug exhibits to be 4,860g while PW3 found it to be 4,688.15g. Thus, there was a difference of 171.45g. An explanation by the prosecution would have been desirable, but on the facts and circumstances of this case we have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. The different in the gross weight which is 171.45g less could be due to the fact that the drug exhibits were weighed by PW3 nearly three months after the drug exhibits were weighed by PW6. We take judicial notice that environmental factors such as climate condition and humidity can attribute to the difference in weight of the impugned drug exhibits. Given that there was an interval of nearly three months before the drug exhibits were sent to PW3, we are driven to the conclusion that the drug exhibits being cannabis could have dried up a little and this could be the reason for the lesser weight. At this juncture, we might hasten to also add that the weighing process by the police is not the
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determining factor in the weight of the drugs, rather it is the weighing done by the chemist which determines the actual weight of the drugs and forms the basis of the charge. It is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department.

[22] In this regard, we are minded of the fact that decided cases had shown that the difference in weight of the drug exhibits between the police and the chemist when left unexplained could result in creating a reasonable doubt to the prosecution's case. This is however dependent on the facts of each case. In *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ Rep 372 for instance the discrepancy in the weight of drug exhibits between the police and the chemist was an issue before the then Supreme Court. The investigating officer in the abovementioned case testified that the weight of the heroin was 113g whilst the chemist gave evidence that it was 102.85g. But that was not the only issue. The Supreme Court found that there were discrepancies between the evidence given by the police and the evidence given by the chemist with regard to the odour and description of the heroine tendered in court. It was on those grounds the Supreme Court held that the appellant ought not to have been called to enter his defence.

[23] This court in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 245, held that the discrepancies in the weight as found by the police and the chemist was fatal because the total weight 'by the time the cannabis reached the hands of the chemist' had increased in weight by 19.65g. But another flaw in the case was that, the investigating officer did not explain the movement of the cannabis from the time he received and weighed them on 25 February 2005 until he placed them in a box on 27 February and sent it to the chemist on 28 February. In fact, in *Tan Yew Choy*, the pertinent issue was more on the failure of the trial judge in not resolving the doubt as to the weight of the cannabis as the weight of the cannabis involved was within the borderline amount that can trigger the statutory presumption of trafficking under s 37(da)(vi) of the DDA.

[24] However, in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, this court upheld the decision of the courts below even though there existed a discrepancy in the weight of the drug exhibits as found by the police and the chemist. In that case the High Court as well as the Court of Appeal found it as a fact that there was no doubt in the identity of the drug exhibits because the evidence before the court showed there was no break in the

- A chain of evidence. The movement of exhibits was clearly explained, and the markings on the drug exhibits were positively identified by the witnesses. The courts below were satisfied that the drug exhibits that were seized from the appellant were the same exhibits produced in the High Court.
- B [25] Similarly on the facts and circumstances of the present case, we are of the view that the difference in weight of the drug exhibits by itself as found by the PW6 and the PW3 is not sufficient to create a reasonable doubt to the prosecution's case. We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the
- C appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses in particular PW4, PW6 and PW3. In fact, the identity of the drug exhibits was never challenged before the High Court. It had never been raised as an issue before the High Court as well as the Court of Appeal.
- D [26] On these grounds we dismissed the appeal and affirmed the conviction and sentence passed against the appellant.
- E *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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